Supreme Court, U.S.
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No. 94-37

In The

Supreme Court of the United States

October Term, 1994

NATALIE GREENFIELD,

Petitioner,

v.

CITY OF MIAMI BEACH, a municipal corporation, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

GORDON D. ROGERS
MULLER, MINTZ, KORNREICH, CALDWELL, CASEY, CROSLAND & BRAMNICK, P.A.
Suite 3600
First Union Financial Center
200 South Biscayne Boulevard
Miami, Florida 33131-2338
(305) 358-5500 (Dade)
(305) 522-0393 (Broward)

Attorneys for Respondents, City of Miami Beach, a municipal corporation, et al.

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OR CALL COLLECT (402) 342-2831

RESTATEMENT OF QUESTION PRESENTED

WHETHER THE ELEVENTH CIRCUIT COURT OF APPEALS ERRED IN AFFIRMING, PER CURIAM, THE DISTRICT COURT'S GRANT OF SUMMARY JUDGMENT TO RESPONDENTS ON THE GROUNDS THAT PETITIONER'S COMPLAINTS ABOUT, INTER ALIA, "WASTE" BECAUSE SHE WAS REQUIRED TO PERFORM CLERICAL TASKS (SUCH AS PHOTOCOPYING) INVOLVED PERSONAL GRIEVANCES WHICH WERE NOT CONSTITUTIONALLY PROTECTED SPEECH AS A MATTER OF LAW.

LIST OF ALL PARTIES TO THE PROCEEDING

Counsel for Respondents certifies to the Court that the following persons are parties to or have an interest in the outcome of this case.

Ernie Barham, Respondent

Diane W. Camber, Respondent

G. Ware Cornell, Jr., Esquire
Counsel for Petitioner

Natalie Greenfield, Petitioner

Honorable Shelby Highsmith, Trial Judge
United States District Court for the Southern District of Florida, Miami Division

David V. Kornreich, Esquire
Former Counsel for Respondents

City of Miami Beach, Respondent[1]

Gordon D. Rogers, Esquire
Counsel of Record for Respondents

Carla Talarico, Respondent

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[1] Pursuant to Supreme Court Rule 29.1, Respondent certifies that the City of Miami Beach, Florida, is a municipal corporation organized under the laws of the State of Florida which has no parent companies or subsidaries. The Bass Museum of Art is operated as a department of the City of Miami Beach.

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RESPONDENTS' BRIEF IN OPPOSITION

The Respondents, the City of Miami Beach, Diane W. Camber, Ernie Barham and Carla Talarico, respectfully request that this Court deny the Petition for Writ of Certiorari, which seeks review of the Eleventh Circuit's, per curiam, affirmance of the summary judgment entered by the District Court in this case. Contrary to Petitioner's representations, the District Court's Order is reported at 844 F. Supp. 1519 (S.D. Fla. 1992). The per curiam affirmance by the Eleventh Circuit Court of Appeals is reported at 20 F.3d 1174 (11th Cir. 1994).

RESTATEMENT OF THE CASE

Respondents adopt and incorporate by reference the undisputed material facts set forth in the orders entered by the District Court, as summarized below.[2]

A. Petitioner's Employment.

On May 14, 1990, the Petitioner became employed as a clerk/typist at the Bass Museum of Art (Bass Museum), which is operated by the City of Miami Beach. At the time she took the job, she advised her supervisors that she was a practicing Orthodox Jew. Respondent Diane Camber, who is also of the Jewish faith, was the Executive Director of the Bass Museum during Petitioner's employment.

Petitioner was a civil service employee whose position was non-exempt for purposes of the overtime pay requirements of the Fair Labor Standards Act, 29 U.S.C. §§ 201, et seq. Petitioner's supervisors at the Bass Museum initially permitted her to work a "flexible"

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[2] Supreme Court Rule 15.1 places an affirmative duty upon respondents to "address any perceived misstatements of fact or law set forth in the petition which have a bearing on the question of what issues would properly be before the Court if certiorari were granted." The District Court's well reasoned opinion accurately sets forth the facts of this case and applies the correct law. Accordingly, but for the above-referenced rule, no further public funds would have been expended upon this litigation. However, it is apparent from the misstatements of fact set forth in the petition that the Petitioner seeks to persuade this Court that this case is something which it clearly is not. The District Court showed remarkable restraint in addressing similar misstatements of fact in the proceedings below. *See, e.g.*, Appendix to Petition at pages 23A-24A.

schedule to permit her to attend to her religious obligations, medical appointments and other personal matters without loss of pay and without utilizing paid leave time. Petitioner ultimately abused those "flex time" privileges by self-adjusting her schedule without supervisory approval such that in some weeks she would work less than the required hours without loss of pay followed by weeks in which she professedly "made up the time" resulting in more than forty (40) hours and additional pay for overtime in those weeks. Petitioner's "flex time" privileges were subsequently curtailed based upon these abuses.

While employed at the Bass Museum, Petitioner was counselled numerous times about her performance problems and about the need to follow the instructions given to her by her supervisors. R-17-57, -58, -60, -61, -65, -88, -90; R1-33-Exh.D; R1-33-Exh.E; R1-33-Exh.F; R1-33-Exh.J.[3]

B. Petitioner's Speech.

Although the Bass Museum is publicly supported, it depends heavily upon donations from private benefactors. Susan Miller and Joyce Kaiser were members of the Friends of the Bass Museum as well as major contributors. During Petitioner's employment, Ms. Miller was the immediate past president of the Friends of the Bass

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[3] References to the record below are designated by volume number, document number and page number or exhibit number in accordance with the practices observed by the Eleventh Circuit Court of Appeal.

Museum and Ms. Kaiser was the incoming president of that philanthropic organization. R1-10-11, -13.

During her employment at the Bass Museum, Petitioner made one or more telephone calls to Susan Miller in which she complained about the limitations on her job duties as a clerk and disputes she had with her supervisors regarding her job performance. In one such conversation, Petitioner read to Ms. Miller memoranda from Petitioner's supervisor concerning her performance deficiencies. Petitioner also complained to Ms. Miller that it was "wasteful" to limit her (Petitioner's) job duties to clerical functions and that the office in which she worked was inefficient because her supervisor required her to spend too much time making photocopies or inventorying supplies.

Petitioner specifically testified that her point in speaking to Ms. Miller was to persuade her that Petitioner's talents could be more efficiently utilized if she were permitted to generate members for the Friends of the Bass Museum instead of being relegated to clerical tasks. Petitioner also testified that she was not advising Ms. Miller of alleged corruption or other malfeasance at the Bass Museum. R1-17A-11, -13. By bringing her complaints to Ms. Miller's attention, Petitioner hoped to persuade Ms. Miller to intercede on her behalf to resolve Petitioner's dissatisfaction with her personal employment conditions. R1-17B-246, -247. Petitioner made no efforts to communicate her various complaints to the public at large.

Petitioner did not complain to Ms. Miller that she was the victim of anti-Semitism. Petitioner's only reference to alleged anti-Semitism when speaking to Ms. Miller was that the Petitioner had been told by someone

else that one of her supervisors had allegedly made an anti-Semitic statement at a meeting at which the Petitioner was not present. R1-17A-19, -20, -33, -34.

Bass Museum Executive Director Diane Camber became aware of Petitioner's activities when Ms. Miller called her to complain that Petitioner had been calling Ms. Miller constantly complaining about the limitations on her job duties and her supervisors. Ms. Miller's purpose in bringing the matter to Ms. Camber's attention was to have her instruct the Petitioner to stop bothering Ms. Miller with intra-office disputes. R1-18-Exh.F. Ms. Camber requested that Ms. Miller put her complaint against Petitioner in writing. That was done in a letter dated January 3, 1991. Petitioner received a three (3) day disciplinary suspension for this and other misconduct in March 1991. Petitioner appealed that disciplinary action to the City's Personnel (civil service) Board, which subsequently conducted a hearing and upheld the suspension.

On May 24, 1991, in spite of Ms. Camber's instructions, Petitioner made another complaint in person to Joyce Kaiser, who at the time was the incoming president of the Friends of the Bass Museum, while the two were at the front desk in the Development Office at the Bass Museum. In that discussion, Petitioner complained to Ms. Kaiser, who was then responsible for membership development, that she (Petitioner) had the ability to develop members but that her supervisors would not give her the opportunity. R1-18-Exh.E. Ms. Kaiser subsequently wrote a letter of complaint to Ms. Camber regarding the Petitioner's conduct. Petitioner was dismissed from City employment on June 28, 1991, based upon charges of conduct unbecoming an employee, attempting to use

political influence to alter her job duties and demonstrating antagonistic conduct toward her supervisors. Petitioner did not appeal her dismissal to the City's Personnel Board.

C. The Summary Judgment.

Petitioner claimed,[4] inter alia, before the District Court that by cancelling her "flex time" privileges, the City failed to reasonably accommodate her religious beliefs and violated her right to free exercise of religion. Petitioner additionally asserted under 42 U.S.C. § 1983 that the City violated her right to freedom of speech under the First Amendment by dismissing her from employment based in whole or in part upon her complaints to Ms. Miller and Ms. Kaiser concerning her working conditions at the Bass Museum.

Respondents moved for partial summary judgment on Petitioner's speech and religion claims on the grounds that she had been afforded reasonable accommodation and her complaints of alleged "wasteful practices" including "misallocation of physical and human resources," (Petition at page 2), were purely personal in nature. Petitioner sought to avoid summary judgment by pointing to her single remark to Ms. Miller about an

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[4] Petitioner has apparently abandoned her First Amendment religious discrimination claim and her religious discrimination and retaliation claims under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e, et seq. and Section 760.10, Florida Statutes (1991). She seeks certiorari herein only with respect to her First Amendment speech claim under 42 U.S.C. § 1983.

alleged anti-Semitic remark which Petitioner did not personally hear and by showing that "she genuinely cared about departmental efficiency," (Petition at page 3).

After the District Court entered summary judgment against the Petitioner on her speech and religious accommodation claims, she sought rehearing. A copy of an "Anti-Defamation League Survey on Anti-Semitism and Prejudice in America" was submitted as an exhibit to Petitioner's motion. (Appendix to Petition at page 23A). From this, she argued that any conceivable mention of alleged anti-Semitism by a public employee is *per se* a matter of public concern sufficient to trigger constitutional protection irrespective of the content, form and context of the speech. She further contended that she was the victim of "direct religious discrimination." The District Court squarely addressed and rejected each of these arguments in denying rehearing. After hearing oral argument, the Eleventh Circuit Court of Appeals affirmed the District Court, per curiam.

REASONS WHY THE PETITION SHOULD BE DENIED

A. Neither The Decision Below Nor The Record Raises The Questions Presented In The Petition.

Granting the petition for certiorari in this case would be an exercise in sophistry. The Petitioner's statement of issues bears little, if any, resemblance to the issues actually decided by the District Court. It is not surprising that the Petition contains no specifics on the speech at issue in this case. Instead, by limiting her references to broad

generic complaints of alleged "wasteful practices," (Petition at page 2), the Petitioner seeks to paint herself as a "whistleblower" who was "genuinely concerned" with eliminating waste in government. The District Court correctly concluded based upon undisputed facts that Petitioner was, instead, blowing her own horn in a purely personal effort for personal advancement.

In *Connick v. Myers*, 461 U.S. 138 (1983), this Court examined the First Amendment rights of public employees who speak not as citizens on matters of public concern but instead as employees airing personal grievances about their jobs. The Court squarely rejected the notion that everything which happens in a public agency is automatically a matter of public concern, stating: "To presume that all matters which transpire within a government office are of public concern would mean that virtually every remark – and certainly every criticism directed at a public official – would plant the seed of a constitutional case." *Connick*, 461 U.S. at 149. Thus, in cases involving discipline or dismissal of government employees based upon speech, the Court first determines whether the speech at issue can be fairly characterized as involving a matter of public concern. If it cannot be fairly so characterized, it is unnecessary to examine the reasons for the employee's dismissal. *Connick*, 461 U.S. at 146. "Whether an employee's speech addresses a matter of public concern must be determined by [its] content, form, and context . . . as revealed by the whole record." *Connick*, 461 U.S. at 147-148. Moreover, "[t]he inquiry into the protected status of speech is one of law, not fact." *Connick*, 461 U.S. at 148 n.7 (citations omitted).

More recently, in *Waters v. Churchill*, ___ U.S. ___, 114 S. Ct. 1878, 1887-88 (1994), this Court stated:

> Rather, the extra power the government has in this area comes from the nature of the government's mission as employer. Government agencies are charged by law with doing particular tasks. Agencies hire employees to help do those tasks as effectively and efficiently as possible. When someone who is paid a salary so that she will contribute to an agency's effective operation begins to do or say things that detract from the agency's effective operation, the government employer must have some power to restrain her. The reason the governor may, in the example given above, fire the deputy is not that this dismissal would somehow be narrowly tailored to a compelling government interest. It is that the governor and the governor's staff have a job to do, and the governor justifiably feels that a quieter subordinate would allow them to do this job more effectively.
>
> The key to First Amendment analysis of government employment decisions, then, is this: The government's interest in achieving its goals as effectively and efficiently as possible is elevated from a relatively subordinate interest when it acts as sovereign to a significant one when it acts as employer.

As to Petitioner's first issue, the District Court did not rule and the Eleventh Circuit did not affirm the notion advanced by Petitioner that a public employee who protests alleged anti-Semitic conditions at work forfeits First Amendment protection merely because he or she is of the Jewish faith. Instead, the District Court correctly ruled as a matter of law that under the facts of

this case, the content, form and context of the Petitioner's isolated comment regarding anti-Semitism to Ms. Miller showed on the whole record that it did not warrant constitutional protection because it related only to her personal gripes and grievances concerning her job. There can be no doubt from the record in this case that Petitioner's motive in speaking was purely to further her own interests and not to bring alleged ethnic bias, misfeasance or malfeasance to the attention of the general public. Accordingly, notwithstanding that complaints of alleged anti-Semitism could be fairly characterized as a matter of public concern in some circumstances, the nature of the whole communication in this case "reflect[s] one employee's dissatisfaction with [her supervisors] and an attempt to turn that displeasure into a cause celebre." *Connick*, 461 U.S. at 148 (footnote omitted).

Petitioner's second proffered issue is similarly a hypothetical unsupported by the record or the decisions below. It is premised upon the erroneous supposition that the Petitioner somehow magically transformed her self-serving personal complaints of alleged "waste" at the Bass Museum into issues of public concern merely by asserting that she "genuinely cared" about efficiency in government.

The District Court correctly analyzed the content of Petitioner's complaints of governmental "waste," which were premised upon her view that it was wasteful to require a person of her talents to perform the menial clerical tasks for which she had been hired. The District Court also properly considered that such speech occurred in the context of the Petitioner's admitted personal motive of persuading a museum benefactor to intercede

and get her a better job soliciting members for the Bass Museum. The District Court then properly considered Petitioner's various communications as a whole and held that Petitioner spoke not as a citizen on matters of public concern but instead as a government employee on an intra-office dispute with her supervisors.

B. The Lower Courts Did Not Depart From This Court's Precedents And Correctly Decided This Case.

Petitioner argues that the lower courts departed from the rule established in *Connick* by failing to separately analyze her single anti-Semitism comment to Ms. Miller under the balancing test explained in *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968). Petitioner assails the District Court's observation that alleged anti-Semitism could be a matter of public concern as inconsistent with its ultimate ruling that when the nature of her various communications were viewed as a whole, "Greenfield's speech was *primarily* aimed toward personal gain, not public concerns." (Appendix at page 23A). This argument is specious.

The record as a whole in this case reflects that the Petitioner was convinced and repeatedly expressed to Museum benefactors that she could do a better job than her supervisors running the Bass Museum "efficiently." *Cf. Berry v. Bailey*, 726 F.2d 670, 674 (11th Cir. 1984), *reh'g denied*, 746 F.2d 815 (11th Cir. 1984), *cert. denied*, 471 U.S. 1101 (1985) (if sheriff's deputy were fired for insubordination, "even if his way of trying to run the Sheriff's Office were objectively more moral or efficient than the

way the Sheriff chose to run his office, he would have no First Amendment protection"). When Petitioner's supervisors rebuffed her aspirations for a better position and required her to perform the clerical tasks for which she had been hired, she saw fit to go over their heads and plead her case directly to the wealthy private benefactors upon whom the Bass Museum depends for operating funds. In so doing, Petitioner put her personal interests above those of her employer by pestering the private benefactors and attempting to drag them into petty intra-office disputes to the point where both benefactors complained and requested that the Petitioner be directed to stop bothering them.

Petitioner acted without regard for the potential consequence of withdrawal of the thoroughly annoyed private benefactors' financial support for the Bass Museum. The District Court thus properly viewed the totality of Petitioner's speech as *primarily* that of a disgruntled employee under *Connick* and ruled that her single reference to a hearsay comment involving alleged anti-Semitism could not transform her speech into a matter of public concern. *See Renfroe v. Kirkpatrick*, 722 F.2d 714 (11th Cir. 1984), *cert. denied*, 469 U.S. 823 (1984); *Terrell v. University of Texas Sys. Police*, 792 F.2d 1360 (5th Cir. 1986), *cert. denied*, 479 U.S. 1064 (1987); *Caine v. Hardy*, 943 F.2d 1406, 1416 (5th Cir. 1991) (en banc), *cert. denied*, ___ U.S. ___, 112 S. Ct. 1474 (1992) (. . . "our task is to decide whether the speech at issue in a particular case was made *primarily* in the plaintiff's role as a citizen or primarily in his role as employee").

CONCLUSION

The District Court and the Eleventh Circuit Court of Appeals correctly applied *Connick* by analyzing the totality of Petitioner's speech including the context in which she spoke and the purely personal motive underlying such speech. Both courts properly concluded that her speech was not protected by the First Amendment because Petitioner spoke primarily as a disgruntled employee of the City and not as a citizen on matters which could be fairly characterized as being of public concern. Accordingly, the petition for a writ of certiorari should be denied.

Respectfully submitted,

GORDON D. ROGERS
MULLER, MINTZ, KORNREICH,
CALDWELL, CASEY, CROSLAND &
BRAMNICK, P.A.
Suite 3600
First Union Financial Center
200 South Biscayne Boulevard
Miami, Florida 33131-2338
(305) 358-5500 (Dade)
(305) 522-0393 (Broward)

Attorneys for Respondents,
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municipal corporation, et al.